Lim Chon Beng v Pulau Kembar Sdn Bhd

HIGH COURT (MELAKA) — SUIT NO 1–22–11 OF 2004
LOW HOP BING J
8 MARCH 2005

Civil Procedure — Costs — Plaintiff's entitlement to cost — Whether allowed having regard to outcome of plaintiff's application

Civil Procedure — Summary judgment — Rules of the High Court 1980, O 81 — Claim for liquidated and unliquidated damages — Whether plaintiff entitled to claim interest on entire purchase price — Whether triable issues existed

Contract — Assignment — Absolute assignment — Whether effectual in law — Subsequent reassignment by bank — Whether plaintiff had locus standi to commence legal proceedings

Contract — Breach — Fundamental breach — Whether plaintiff entitled to rescind the agreement — Whether defendant had a defence to the plaintiff's claim

Contract — Damages — Assessment of damages — Claim for unquantified post-rescissionary damages — Whether suitable under summary judgment application or whether should proceed to trial

The plaintiff had filed an application by way of summons in chambers (encl 6) for summary judgment under O 81 of the Rules of the High Court 1980. The substantially uncontroverted facts of this case were that, by a written agreement dated 14 September 1996 ('the agreement'), the plaintiff purchased a shop lot from the defendant, a housing developer, at a price of RM590,800. Pursuant to cl 19(b)(i) of the agreement, the defendant was required to complete the construction and deliver possession of the property to the plaintiff within 48 months from a date, a certain 'condition precedent' was satisfied. Till present, the defendant had still not completed the construction of the property despite the fact that the plaintiff as at 10 June 1999 had paid to the defendant a total sum of RM295,400 as progress payments towards the purchase price together with late payment interest of RM467.80 pursuant to cl 6. Despite numerous enquiries, the plaintiff was unable to obtain any satisfactory response from the defendant as to when the property would be delivered to the plaintiff and as to whether he could claim liquidated damages for the defendant's late completion. This led to the plaintiff sending through his solicitors a written enquiry dated 6 May 2002. Receiving no response from the defendant, the plaintiff sent a written notice dated 28 May 2002 requiring the defendant to deliver possession of the property by 31 July 2002, failing which the plaintiff would terminate the agreement and commence legal proceedings against the defendant. The defendant denied having received this notice. Receiving no reply from the defendant, the plaintiff eventually by written notice dated 9June 2003 informed the defendant that the agreement was deemed terminated

through the defendant's own repudiation. The defendant again denied receiving this notice. In the absence of any response from the defendant, the plaintiff had on 16 January 2004 filed this originating summons seeking, *inter alia*: (a) a declaration that the plaintiff had rightly terminated the agreement or that the agreement had been rescinded through the defendant's repudiation as at 9 June 2003 or such other date as deemed appropriate by the court; (b) refund of the sum of RM295,400 paid by the plaintiff by way of progress payments towards the purchase price; (c) liquidated damages of RM146,000.43 being 10% interest on the purchase price as calculated from the completion date to the date of rescission; and (d) post-rescissionary damages. It was also an important fact, that on 20 February 1997, the plaintiff had executed an assignment in favour of Citibank Bhd ('Citibank') and the notice of the absolute assignment had been duly given to the defendant. This was signified by the affixing of the defendant's common seal in the presence of two directors of the defendant in the absolute assignment itself. On 4 June 2003, Citibank executed a deed of limited reassignment in favour of the plaintiff to institute legal proceedings. At the hearing of this application, the defendant raised a preliminary objection, in that, only Citibank had the *locus standi* to bring this action as the plaintiff had given Citibank an absolute assignment. The defendant further argued that the deed of limited reassignment given by Citibank to the plaintiff was unenforceable as the firm of solicitors stated therein were no longer the plaintiff's solicitors. The plaintiff's counsel in reply, responded that the defendant had effectively waived any irregularity in the proceedings by entering an unconditional appearance and was precluded from raising that preliminary objection. The defendant also further submitted that there was no fundamental breach on the part of the defendant which entitled the plaintiff to rescind the agreement.

Held, allowing the plaintiff's application in part:

(1) As the defendant had notice of the absolute assignment and the provisions of s 4(3) of the Civil Law Act 1956 had no doubt been complied with, the assignment should be and be deemed to have been effectual in law (see para 26).

(2) There was a reassignment by the bank to the plaintiff, which put the locus standi of the plaintiff on a very firm footing. Therefore, there were no merits in the defendant's submission (see para 28); *Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549 not followed.

(3) The defendant's failure to deliver the property to the plaintiff within the time expressly stated to be of the essence, clearly constituted a fundamental breach of the agreement, which had brought about the defendant's repudiation of the agreement. The plaintiff was thereby entitled to the remedy of rescission of the agreement (see para 31); *Cheah Khoon Tee v Crimson Development Sdn Bhd* [1999] MLJU 108 not followed.

(4) The plaintiff's quantification of liquidated damages based on the entire purchase price was highly arguable as the plaintiff had not effected payment thereof but merely RM295,400 which was 50% of it (see para 46).

(5) Whether or not the plaintiff was entitled to claim 10% interest on the entire purchase price when he had only paid half of it was clearly a triable issue. The plaintiff's claim in prayer (c) cannot be said to be plain and obvious (see para 47).

(6) The plaintiff's prayer (d) for post-rescissionary damages, being unquantified, would be a matter which had to be proved at the trial by way of full hearing requiring a mature consideration of viva voce evidence which must in turn be assessed and evaluated after the process of cross-examination and re-examination of the witnesses called by the parties (see para 48).

(7) The plaintiff had succeeded in establishing that the defendant had no defence to the plaintiff's claim for rescission of the agreement under prayer (a) and for the plaintiff's claim for the refund of RM295,400 paid by the plaintiff to the defendant pursuant to prayer (b) of the reliefs, together with interest at 8% per annum with effect from 9 June 2003 until the date of realisation (see para 49).

(8) Prayers (c) and (d) of the plaintiff's application are to proceed to full hearing at the trial (see para 50).

(9) On the question of costs, having regard to the submissions of the counsel for both parties respectively and summary judgment entered for only two out of four prayers sought by the plaintiff, the positions of the parties were placed in equilibrium. As a result of which, the fair and reasonable order was that, the parties are to bear their own costs (see para 51).

[Bahasa Malaysia summary

Plaintif telah memfailkan satu permohonan melalui saman dalam kamar (Lampiran 6) untuk penghakiman terus di bawah A 81 Kaedah-Kaedah Mahakamah Tinggi 1980. Fakta-fakta substansial kes ini yang tidak dicabar adalah bahawa, melalui satu perjanjian bertulis bertarikh 14 September 1996 ('perjanjian tersebut'), plaintif telah membeli sebuah lot kedai daripada defendan, sebuah syarikat pemaju perumahan, dengan harga RM590,800. Menurut klausa 19(b)(i) perjanjian tersebut, defendan dikehendaki menyiapkan pembinaan dan memberikan milikan kosong hartanah tersebut kepada plaintif dalam masa 48 bulan daripada satu tarikh, di mana satu 'prasyarat' telah diselesaikan. Sehingga kini, defendan masih belum menyiapkan pembinaan harta tersebut walaupun plaintif telah pada 10 Jun 1999 membayar kepada defendan satu jumlah sebanyak RM295,400 sebagai bayaran berkala terhadap harga belian

termasuk faedah bayaran terlewat sebanyak RM467.80 menurut klausa 6. Walaupun plaintif telah membuat banyak pertanyaan, plaintif masih tidak menerima apa-apa jawapan yang memuaskan daripada defendan mengenai tarikh harta tersebut akan diserahkan kepada plaintif dan sama ada plaintif boleh menuntut ganti rugi yang ditetapkan disebabkan kelewatan defendan dalam menyiapkan pembinaan tersebut. Dengan ini, plaintif telah melalui peguamcaranya, menghantar satu pertanyaan bertulis bertarikh 6 Mei 2002. Setelah plaintif tidak menerima apa-apa jawapan daripada defendan, plaintif telah menghantar satu notis bertulis bertarikh 28 Mei 2002, di mana defendan dikehendaki menyerahkan milikan kosong harta tersebut sebelum 31 Julai 2002 dan sekiranya defendan gagal berbuat demikian, plaintif akan menamatkan perjanjian tersebut dan memulakan tindakan undang-undang terhadap defendan. Defendan telah menafikan menerima notis tersebut. Memandangkan plaintif tidak menerima apa-apa jawapan daripada defendan, plaintif akhirnya melalui satu notis bertulis bertarikh 9 Jun 2003 telah memaklumkan defendan bahawa perjanjian tersebut telah dianggap sebagai ditamatkan melalui repudiasi defendan sendiri. Sekali lagi, defendan menafikan penerimaan notis ini. Kerana ketiadaan apa-apa jawapan daripada defendan, plaintif telah pada 16 Januari 2004 memfailkan saman pemula ini untuk perintah-perintah bahawa *inter alia*: (a)satu deklarasi bahawa plaintif telah menamatkan perjanjian tersebut dengan sah atau perjanjian tersebut telah dibatalkan melalui repudiasi defendan pada 9 Jun 2003 atau tarikh lain yang dianggap sesuai oleh mahkamah; (b) pemulangan bayaran sebanyak RM295,400 yang telah dibayar oleh plaintif sebagai bayaran kemajuan terhadap harga pembelian; (c) gantirugi yang ditetapkan sebayak RM146,000 yang merupakan faedah 10% ke atas harga belian yang dikira dari tarikh penyelesaian sehingga tarikh penamatan; dan (d) kerugian selepas pembatalan. Ianya juga suatu fakta penting, bahawa pada 20 Februari 1997, plaintif telah melaksanakan satu penyerahhakkan kepada Citibank Bhd ('Citibank') dan notis penyerahhakkan mutlak tersebut telah diberikan kepada defendan. Ini dilihat melalui lekatan cap mohor defendan dalam penyerahhakkan mutlak tersebut dengan kehadiran dua pengarah defendan. Pada 4 Jun 2003, Citibank telah melaksanakan satu surat ikatan peletakhakan semula yang terhad bagi plaintif untuk memulakan tindakan undang-undang. Pada perbicaraan permohonan ini, defendan telah membangkitkan satu bantahan awal, bahawa hanya Citibank yang mempunyai *locus standi* untuk membawa tindakan ini memandangkan plaintif telah memberikan Citibank suatu penyerahhakkan mutlak. Defendan juga telah berhujah bahawa surat ikatan perletakhakkan semula yang terhad yang yang diberikan oleh Citibank kepada plaintif, tidak boleh dikuatkuasakan kerana firma guaman yang dinyatakan di dalam surat ikatan tersebut kini tidak lagi mewakili plaintif. Peguamcara plaintif dalam jawapannya telah berhujah bahawa defendan telah secara berkesan mengetepikan sebarang salah aturan dalam prosiding tersebut dengan kemasukan satu kehadiran tanpa syarat dan kini dihalang daripada membangkitkan bantahan awal tersebut. Defendan juga telah berhujah bahawa tidak ada apa-apa

kemungkiran asasi oleh defendan yang memberikan hak kepada plaintif untuk menamatkan perjanjian tersebut. A

Diputuskan, membenarkan sebahagian permohonan plaintif:

(1) Memandangkan defendan mempunyai notis akan penyerahhakkan mutlak tersebut dan peruntukan-peruntukan s 4(3) Akta Undang-Undang Sivil dengan tanpa apa-apa keraguan telah dipatuhi, penyerahhakkan tersebut hendaklah dianggap sebagai berkesan dari sisi undang-undang (lihat perenggan 26). B

(2) Terdapat suatu penyerahhakkan semula oleh pihak bank kepada plaintif, yang memberikan plaintif *locus standi* yang kukuh. Oleh yang demikian, tidak ada apa-apa merit dalam penghujahan defendan (lihat perenggan 28); *Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549 tidak diikut. C

(3) Kegagalan defendan untuk menyerah harta tersebut kepada plaintif dalam masa yang dinyatakan, di mana masa adalah asas perjanjian, dengan jelas membentuk satu kemungkiran asasi perjanjian tersebut, yang telah menyebabkan repudiasi perjanjian tersebut oleh defendan. Plaintif adalah berhak kepada remedi penamatan perjanjian tersebut (lihat perenggan 31); *Cheah Khoon Tee v Crimson Development Sdn Bhd* [1999] MLJU 108 tidak diikut. D E

(4) Pengiraan gantirugi yang ditetapkan berdasarkan kepada keseluruhan harga belian adalah sangat dipertikaikan memandangkan plaintif belum menjelaskan bayaran tersebut tetapi hanya RM295,400 yang merupakan 50% daripada jumlah keseluruhan tersebut (lihat perenggan 46). F

(5) Sama ada plaintif berhak untuk menuntut faedah 10% ke atas keseluruhan harga belian memandangkan plaintif hanya membayar separuh daripada harga belian tersebut jelas merupakan satu isu yang dipertikaikan. Tuntutan plaintif dalam permohonan (c) tidak boleh dikatakan sebagai nyata dan jelas (lihat perenggan 47). G

(6) Permohonan (d) plaintif untuk kerugian selepas pembatalan, yang tidak dijumlahkan, adalah suatu perkara yang perlu dibuktikan dalam perbicaraan penuh dengan keperluan pertimbangan matang keterangan *viva voce* yang perlu ditaksirkan dan diberi penilaian selepas proses pemeriksaan balas dan pemeriksaan semula saksi-saksi yang dipanggil oleh pihak-pihak (lihat perenggan 48). H

(7) Plaintif telah berjaya membuktikan bahawa defendan tidak mempunyai pembelaan kepada tuntutan plaintif untuk menamatkan perjanjian tersebut di bawah permohonan (a) dan kepada tuntutan plaintif untuk pemulangan bayaran sebanyak RM295,400 yang dibayar oleh plaintif kepada defendan menurut permohonan (b) untuk relief, bersama dengan faedah pada I

kadar 8% setahun dari 9 Jun 2003 hingga tarikh penyelesaian (lihat perenggan 49).

(8) Permohonan (c) dan (d) dalam permohonan plaintif tersebut perlu dibawa ke perbicaraan penuh semasa perbicaraan (lihat perenggan 50).

(9) Di atas persoalan kos, setelah mengambil kira hujahan-hujahan oleh peguamcara kedua-dua pihak dan kemasukan penghakiman terus untuk hanya dua daripada empat permohonan yang dipohon oleh plaintif, pihak-pihak diletakkan di kedudukan yang sama. Memandangkan begitu, perintah yang adil dan berpatutan adalah untuk pihak-pihak menanggung kos sendiri (lihat perenggan 51).]

Notes

For cases on triable issues, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3170–3243.

For cases on plaintiff's entitlement to costs, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1826-1827.

For a case on absolute assignment, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2092.

For cases on fundamental breach, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2310-2314.

For a case on assessment of damages, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2841.

Cases referred to

Cheah Khoon Tee v Crimson Development Sdn Bhd [1999] MLJU 108 (not folld)

Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd [1996] 5 MLJ 549 (not folld)

Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor [1999] MLJU 167 (refd)

M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd [2004] 4 CLJ 852 (refd)

Nga Sheau Sheau v United Merchant Finance Bhd [2004] 3 CLJ 243 (refd)

Phileoalied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513 (refd)

Travelsight (M) Sdn Bhd & Anor v Atlas Corp Sdn Bhd [2003] 6 MLJ 658 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Contracts Act 1950 ss 40, 56(1)
Rules of the High Court 1980 O 81

Rohaya bte Hj Yaziz (Raymond & Yeo) for the defendant.
Ang Beng Hoe (Ang Beng Hoe & Co) for the plaintiff.

Low Hop Bing J:

I APPLICATION

[1] This is an application in encl (6) by way of summons in chambers filed by the plaintiff for summary judgment under O 81 of the Rules of the High Court 1980.

[2] A reference hereinafter to an order and a rule is a reference to that order and rule of the Rules of the High Court 1980, unless the context otherwise requires.

II FACTUAL BACKGROUND

[3] This is substantially uncontroverted. By a written agreement dated 14September 1996 ('the agreement'), the plaintiff purchased a shoplot ('the property') from the defendant, a housing developer, at a price of RM590,800 ('the purchase price').

[4] Pursuant to cl 19(b)(i) of the agreement, the defendant was required to complete the construction and deliver possession of the property to the plaintiff within 48 months from a date a certain 'condition precedent' was satisfied.

[5] A reference to a clause hereinafter is a reference to that clause in the agreement.

[6] Clause 3(a) defines 'condition precedent' as the approval of building plans by the relevant authorities.

[7] Clause 3(b) requires the developer to notify the plaintiff upon the satisfaction of the condition precedent, accompanied by the architect's certification. Vide notice dated 5 April 2002, the defendant notified the plaintiff that the condition precedent was satisfied on 18 December 1996 but without the accompaniment of the architect's certification.

[8] Clause 7 makes time of the essence of the contract.

[9] Until today, the defendant has still not completed the construction of the property despite the fact that the plaintiff as at 10 June 1999 had paid to the defendant a total sum of RM295,400 as progress payments towards the purchase price together with late payment interest of RM467.80 pursuant to cl 6.

[10] The defendant's statement of account shows that there was no outstanding payment due from the plaintiff to the defendant, the last payment invoice being dated 3 June 1999 for the fourth stage of progress under para 2(c) of the Third Schedule to the agreement, and the defendant had not completed the fifth stage of progress under para 2(d) thereof.

[11] In accordance with cl 19(b)(iii), in the event the defendant failed to deliver possession of the property by the completion date, the defendant has to pay agreed liquidated damages to be calculated from day to day at the rate of 10% per annum of the purchase price from the completion date until the date of delivery of vacant possession.

[12] Despite numerous enquiries, the plaintiff was unable to obtain any satisfactory response from the defendant as to when the property would be delivered to the plaintiff and as to whether he could claim liquidated damages for the defendant's late completion. This led to the plaintiffs sending through his solicitors a written enquiry dated 6 May 2002.

[13] Receiving no response from the defendant, the plaintiff sent a written notice dated 28 May 2002 requiring the defendant to deliver possession of the property by 31 July 2002, failing which the plaintiff would terminate the agreement and commence legal proceedings against the defendant. The defendant denied having received this notice.

[14] Again receiving no reply, the plaintiff eventually by written notice dated 9 June 2003 informed the defendant that the agreement was deemed terminated through defendant's own repudiation. The defendant again denied having received this notice.

[15] In the absence of any response from the defendant, the plaintiff has on 16 January 2004 filed this originating summons seeking, *inter alia*:

(a) a declaration that the plaintiff had rightly terminated the agreement or that the agreement had been rescinded through the defendant's repudiation as at 9 June 2003 or such other date as deemed appropriate by the court;

(b) refund of the sum of RM295,400 paid by the plaintiff by way of progress payments towards the purchase price;

(c) liquidated damages of RM146,000.43 being 10% interest on the purchase price as calculated from the completion date to the date of rescission; and

(d) post-rescissionary damages.

[16] These prayers are cumulatively referred to as 'the reliefs' which are also sought by the plaintiff in the instant application for summary judgment.

[17] On 20 February 1997, the plaintiff executed an assignment in favour of Citibank Bhd ('Citibank') and notice of the absolute assignment has been duly given to the defendant and this was signified by the affixing of the defendant's common seal in the presence of two directors of the defendant in the absolute assignment itself.

[18] On 4 June 2003, Citibank executed a deed of limited reassignment in favour of the plaintiff to institute legal proceedings.

[19] The defendant has entered unconditional appearance and filed its defence.

[20] The minutes of the plaintiff setting out the reliefs are attached to the summons in chambers apparently under O 81 r 2(2).

III Locus Standi

[21] Cik Rohaya bt Hj Yaziz, learned counsel for the defendant, referred to the assignment by the plaintiff to Citibank in which pursuant to cl 4.01 read with cl 2.02 thereof, the plaintiff has given Citibank an absolute assignment, as a result of which only Citibank has the locus standi to bring this action, relying on *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513 (FC); s 4(3) of the Civil Law Act 1956; and *Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549 (HC).

[22] It was also argued for the defendant that the deed of limited reassignment dated 4 June 2003 given by Citibank to the plaintiff is unenforceable as the firm of solicitors Betty Chew & Co stated therein were no longer the plaintiff's solicitors.

[23] Mr Ang Beng Hoe, plaintiff's learned counsel, responded that as the defendant has entered unconditional appearance, the defendant has effectively waived any irregularity in the proceedings and so is precluded from raising this preliminary objection. *Nga Sheau Sheau v United Merchant Finance Bhd* [2004] 3 CLJ 243 was cited.

[24] The answer to the defendant's preliminary objection has already been given by me in *Nga Sheau Sheau*, where one of the issues for determination was whether the defendant, having entered an unconditional appearance, was precluded from raising the plaintiff's locus standi therein. At pp 247h to 248a, I held as follows :

> In my judgment, it must be stated here that the defendant's desire to raise the preliminary objection pertaining to the plaintiff's locus standi must be preceded by the filing of a conditional appearance but the defendant has not done so. The challenge based on the plaintiff's locus standi is in effect grounded on the irregularity of the writ filed by the plaintiff.
>
> It is trite law that once the defendant has filed an unconditional appearance, as is the case here, the defendant has effectively waived any irregularity of the plaintiff's writ and so is precluded from raising a preliminary objection based on the plaintiff's locus standi: *The Avro International* [1988] 1 MLJ 147 at 149 (CA Singapore) per Lai Kew Chai J.

[25] Be that as it may, I shall also consider the merits of the defendant's submission. *Phileoallied Bank*, cited for the defendant, does not concern any issue of locus standi at all.

[26] In relation to s 4(3) of the Civil Law Act 1956 from which the defendant seeks support, I am of the view that as the defendant has notice of the absolute assignment, and the provisions of s 4(3) of the Civil Law Act 1956 have no doubt been complied with, the assignment shall be and be deemed to have been effectual in law.

[27] In *Christina Angelina*, referred to by the defendant, an absolute assignment was executed by the purchaser in favour of the bank which gave the loan to the purchaser for the purchase of a property. There was no reassignment by the bank to the purchaser to institute legal proceedings in the event of a breach by the developer. The purchaser instituted legal proceedings for, *inter alia*, late delivery but the developer raised the issue of the purchaser's lack of locus standi and it was upheld by the magistrate and Abdul Kadir Sulaiman J (now JCA) who held, inter alia, that the purchaser as assignor cannot maintain the action against the developer without joining the bank as co-plaintiff. On the facts there, with respect, I am of the view that the decision of the learned judge is correct.

[28] However the facts before me show that there is a reassignment by the bank to the plaintiff, thereby putting the locus standi of the plaintiff herein on a very firm footing. I am therefore unable to find any merit in the defendant's submission.

IV RESCISSION

[29] It was contended for the defendant that there was no fundamental breach on the part of the defendant and so the plaintiff could not rescind the agreement, but a contrary stand was presented for the plaintiff.

[30] In my view, the question of whether there is a fundamental breach on the part of the defendant is to be determined by reference to the facts and circumstances of this case, which are in turn to be tested against the express provisions of the agreement, which have been adumbrated above.

[31] The defendant's failure to deliver the property to the plaintiff within the time expressly stated to be of the essence clearly constitutes a fundamental breach of the agreement, which has brought about the defendant's repudiation of the agreement, thereby entitling the plaintiff to the remedy of rescission of the agreement. This is evident from the provisions of s 56(1) of the Contracts Act 1950 which is reproduced as follows :

> 56.(1) When a party to a contract [the defendant herein] promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promisee [the plaintiff herein], if the intention of the parties was that time should be of the essence of the contract.

[32] A reference hereinafter to a section is a reference to that section in the Contracts Act 1950, unless the context otherwise requires.

[33] Illustrations of fundamental breaches abound in the decisions of our courts.

[34] In *Lim Sew Lan v Pembangunan Hysham Sdn Bhd & Anor* [1999] MLJU 167, where the plaintiff purchased a three-storey building from the defendant's development project in Setapak, Kuala Lumpur, in which recital C of the sale and purchase agreement highlighted that the development consisted of six blocks of five-to-seven storey shop office and service suites. However, the defendant scaled down the development to exclude the service suites and reduced the total floor space of the development by about one-half. RK Nathan J (as he then was) held, inter alia, that the defendant's breach of the agreement went to the root of the contract, entitling the plaintiff to terminate the agreement.

[35] Where the plaintiff had entered into an agreement to purchase 1592 square feet of property which was reduced by 122 square feet, as in *Travelsight (M) Sdn Bhd & Anor v Atlas Corporation Sdn Bhd* [2003] 6 MLJ 658, it was held by Abdul Malik Ishak J that the plaintiff was entitled to rescind the agreement.

[36] In *M-Concept Sdn Bhd v Berjaya Times Square Sdn Bhd* [2004] 4 MLJ 556, the sale and purchase agreement between the plaintiff purchaser and the defendant developer in respect of a commercial shop-lot provided that time was of the essence and that the defendant was to deliver vacant possession thereof to the plaintiff on or before 23 November 1998. The plaintiff had paid 90% of the total purchase price but the defendant was unable to deliver vacant on that date. The plaintiff sought a declaration that it be entitled to rescind the agreement. Hishamudin Yunus J held, inter alia, that:

> The inability of the defendant to deliver vacant possession of the shop-lot to the plaintiff for such an unreasonably lengthy period of time constituted a fundamental breach of the agreement, thereby entitling the plaintiff to rescind the agreement. Indeed, time was of the essence of the agreement, and the excessive delay on the part of the defendant had rendered the agreement voidable at the option of the plaintiff (Contracts Act 1950, s 56(1)). This was so irrespective of the fact that the agreement did not contain a provision on rescission or the fact that the plaintiff was also entitled to claim liquidated damages for late delivery.

[37] Under s 40, when a party to a contract such as the defendant herein has refused to perform, or disabled himself from performing, his promise in its entirety, the promise such as the plaintiff herein may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance. I am of the view that s 40 applies as the plaintiff has not signified his acquiescence in its continuance. On the contrary the plaintiff has by way of the final letter dated 9 June 2003 informed the defendant that the agreement was deemed terminated through defendant's own repudiation.

[38] In *Cheah Khoon Tee v Crimson Development Sdn Bhd* [1999] MLJU 108, there were two applications for declaration that the respective sale and purchase agreement between the plaintiffs and the defendant in respect of two units of condominium had been properly terminated, and for the refund of all monies paid by the plaintiffs as well as for liquidated damages, interests and costs. The defendant failed to deliver the units on or before the delivery date ie 28 April 1996, as a result of which the plaintiffs' solicitors sent letters to the defendant informing of their intention to terminate the agreements and claiming for the aforesaid reliefs.

[39] However, the plaintiffs' application was dismissed by Steve Shim J (now CJ Sabah 86 Sarawak) as:

(1) the plaintiffs took some 18 months after knowing of the delivery date before deciding to terminate the agreement; and

(2) no notice of any fresh limit had been given by the plaintiffs to the defendant and the defendant had continued with the construction works on the two units up to October or November 1997, well after the expiry of the completion date for delivery on 28 April 1996.

[40] The learned judge held that the plaintiffs have waived their rights to rely on time being of the essence of the agreement and are therefore estopped from terminating or rescinding the agreements.

[41] The facts there are distinguishable from the narrative of facts before me. That being the case, I am of the view that *Cheah Khoon Tee*, is not supportive of the defendant's contention. In the circumstances, I hold that the plaintiff is entitled to rescind the agreement.

V DAMAGES

[42] The plaintiff has included liquidated damages and post-rescissionary damages in the instant application for summary judgment.

[43] Bundles of authorities had been prepared, on the one hand, by plaintiff's counsel to establish the claim, and on the other hand, by defendant's counsel to demolish it, for whose enormous efforts respectively I record my commendation.

[44] On my part,, in order to comprehend the ambit of O 81 invoked for the plaintiff, the relevant portion merits reproduction as follows:

O 81 r 1(1)

In any action begun by writ indorsed with a claim

(a) … for specific performance of an agreement (whether in writing or not) for the sale, purchase … of any property, with or without an alternative claim for damages; or

(b) for rescission of such an agreement;

(c) …

the plaintiff may, on the ground that the defence has no defence to the action apply to the court for judgment.'

[45] A cursory reading of prayer (c) of the reliefs sought by the plaintiff shows a sum of RM 146,300 quantified as liquidated damages, being 10% on the purchase price and not on the sum of RM295,400 actually paid by the plaintiff to the defendant.

[46] Bearing in mind that the instant application is for summary judgment which is only to be entered in the absence of a triable issue, or where the plaintiff's claim is plain and obvious, I am of the view that the plaintiff's quantification of liquidated damages based on the entire purchase price is highly arguable as the plaintiff has not effected payment thereof but merely RM295,400 which is 50% of it.

[47] Whether or not the plaintiff is entitled to claim 10% interest on the entire purchase price when he has only paid half of it is clearly a triable issue. In other words, the plaintiff's claim in prayer (c) cannot be said to be plain and obvious.

[48] Similarly, the plaintiff's prayer (d) for post-scissionary damages, being unquantified, would be a matter which has to be proved at the trial by way of a full hearing requiring a mature consideration of viva voce evidence which must in turn be assessed and evaluated after the process of cross-examination and re-examination of the witnesses called by the parties.

VI Conclusion

[49] On the foregoing grounds, I hold that the plaintiff has succeeded in establishing that the defendant has no defence to his claim for rescission of the agreement under prayer (a) and also his claim for the refund of RM295,400 paid by the plaintiff to the defendant pursuant to prayer (b) of the reliefs, together with interest at 8% per annum with effect from 9 June 2003 until the date of realisation.

[50] However, I am unable to say the same for prayers (c) and (d) which are therefore to proceed to full hearing at the trial.

VII Costs

[51] On the question of costs, having regard to the submissions of the counsel for both parties respectively, and summary judgment has been entered for

only two out of four prayers sought by the plaintiff, the positions of the parties herein are placed in equilibrium, as a result of which the fair and reasonable order is that the parties are to bear their own costs, which I hereby order.

Plaintiff's application allowed in part.

Reported by Eugene Louis